INDEX.

Statement of the Case 1
Assignment of Errors 8
Jurisdiction of Circuit Court of Appeals 10
Jurisdiction of District Court to assess damages exclusive 10
Jurisdiction of District Court on the ground of Federal question 19
Multiplicity of Suits 30

TABLE OF CASES CITED.

Union Planters Bank v. Memphis, 189 U. S. 71 10
Carolina Glass Co. v. S. Carolina, 240 U. S. 305-18 10
In re Englehard, 231 U. S. 646 12
Reagan v. Farm Loan & Trust Co., 154 U. S. 362-390 12
M. K. & T. R R. Co. v. M. R. & W. Comnr., 183 U. S. 53-60 12
Lea v. Deakin, 13 Fed. 514 13
Leahman v. McQuon, 31 Fed. 138 13
Coosa Mining Co. v. Farmers Mining Co., 51 Fed. 107 14
Leslie v. Brown, 90 Fed. 174 14
Tyler Mining Co. v. Lost Chance Mining Co. Ib. 22 14

TABLE OF CASES CITED—Continued.

Cimiotti Unhairing Co. v. American Fur Refining Co., 158 Fed. 173 14
Mississippi Valley Fuel Co. v. Watson Coal Co., 202 Fed. 124-5 14
Ridlich Mfg. Co. v. Rice & Co., 203 Fed. 722 .. 14
Lea v. Deakin, 13 Fed. 514 15
Phelps v. Mutual Reserve Fund Life Assn., 112 Fed. 464-5 16
French v. Hay, 22 Wallace, 252 17
Taylor v. Taintor, 16 Wal. 370 17
Prout v. Starr, 188 U. S. 537-544 17
Harkrader v. Wadley, 172 U. S. 148-163 17
R. R. Co. v. Bellamy, 211 Fed. 172 19
M. K. & T. v. Elliot, 184 U. S. 530-4 22
R. R. Co. v. Bellamy, 211 Fed. 172 22
Russell v. Farley, 105 U. S. 433 27
Houghton v. Meyers, 208 U. S. 149 27
Wyman v. Bowman, 127 Fed. 257-263 31

IN THE

Supreme Court of the United States

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY CO.....*Appellant*,

v. No. 183.

WILLIAM F. McKNIGHT, J. SAM ROWLAND and GEORGE W. BELLAMY, RAILROAD COMMISSIONERS OF THE STATE OF ARKANSAS.....*Appellees.*

BRIEF ON BEHALF OF APPELLANT.

STATEMENT OF THE CASE.

On July 25, 1908, the appellant filed a bill in the United States Circuit Court for the Western Division of the Eastern District of Arkansas against the railroad commissioners of that State to enjoin the enforcement of freight rates on railroads within the State theretofore put in force by said commission,

and a rate of two cents per mile for the transportation of passengers, prescribed by a statute of the State passed on February 9, 1907, and promulgated by the said railroad commissioners by an order issued May 15, 1907, on the ground that said rates were confiscatory and in violation of the Fourteenth Amendment to the Constitution of the United States. A temporary injunction was granted on September 3, 1908, upon the filing by complainant of an injunction bond, with sureties, in the sum of $200,000. On June 23, 1909, the court made an order requiring the complainant to file an additional injunction bond in the sum of $800,000, without sureties, which was accordingly done. On May 11, 1911, a final decree was rendered, perpetually enjoining said passenger and freight rates. Said pleadings, orders and bonds are set out at length at pages 3-45 of the printed record. An appeal was taken to this court, and on the 8th day of June, 1913, the decree was reversed. (Allen *et al.* v. St. Louis, Iron Mountain & Southern Ry. Co., 230 U. S. 553.) On July 18, 1913, the mandate of the Supreme Court was filed in the district court, and an order entered dismissing the bill without prejudice, and dissolving the temporary and permanent injunctions theretofore granted. This order contains the following provision:

> "And thereupon, the court, of its own motion, and against the objection of the complainant, refers, under rule 15 of this court, the matter of damages alleged to have

been sustained by the defendants, the Railroad Commission of the State of Arkansas, by reason of the granting of the temporary and permanent injunctions herein, to Jeremiah G. Wallace, Esq., who is hereby appointed a special master for the purpose of determining the damages sustained. That in determining these damages, for the recovery of which the said commissioners are not acting for themselves, but for the benefit of all persons, shippers, consignees and passengers, who have sustained any damages by reason of the granting of said injunctions, the master is hereby authorized, for the purpose of ascertaining these facts, to examine witnesses, administer oaths, and call upon the plaintiff herein for any books or papers, or transcripts thereof, which, in his opinion, are necessary for the purpose of enabling him to determine any facts in issue in connection with any claim filed with him."

Rule 15 referred to in this order is as follows:

"In all cases in which an injunction has been granted, and a bond executed by the complainants, damages sustained by the party enjoined, in case the injunction is dissolved, may be assessed in the same proceeding, either by the court or by reference to a master, and judgment entered in the same action against the sureties on the bond; provided, however, that unless the damages are thus assessed in the cause, or a judgment entered that the party enjoined is entitled to no damages by reason of the improper granting of the injunction, he may proceed on the bond in an action at law

without any further order or leave of the court."

The order further directed the special master to give notice by publication, in a manner prescribed, that all persons having any claims against the complainant by reason of the granting of said injunction should present the same to him within a time designated, and file proofs thereof with him, and that he should make a report of his findings to the court, together with the evidence taken by him. (Rec. 48.)

On the 9th of January, 1914, complainant filed a supplemental bill, setting out the aforesaid proceedings, alleging that they were still pending and undetermined, and notwithstanding said proceedings and orders of the court, and the election of the defendants in the main case, as the representatives of all passengers and shippers on the complainant's railroad within the State, to proceed in the district court by a reference to the special master to take an account of the damages sustained by reason of the granting of said injunctions, the defendant Howard H. Gallup had instituted suit in a court of the State for the recovery of the difference between the passenger and freight rates so enjoined, and the rates charged said defendant by the complainant during the time the injunction was in force, and that the defendant, William J. Metcalf, and many other persons too numerous to be named, were threatening to institute similar ac-

tions against complainant. It was further alleged that a very large number of claims for refunds, amounting to more than half a million dollars, had been filed before the special master, and were under investigation by him. In many instances duplicate claims covering the same shipment by parties severally claiming to be entitled to the alleged excessive charges have been filed, and it will be necessary to determine who, among said claimants, was entitled to recover any allowance that might be made by the master in respect to such claims. Many persons whose claims were disallowed by the master were threatening to bring independent suits against complainant for the recovery of the claims presented to and disallowed by the master, and unless an order enjoining such proceedings should be made, many thousands of such suits would be brought, and complainant required to produce its books and records in defense of each of the suits so brought against it for the purpose of showing the difference between the inhibited rates and those actually charged by it, and would be put to great expense and be compelled to defend a multitude of suits; that many of the suits so instituted would embrace claims that had already been passed upon by the special master, and many in which allowances had been made by the special master to other parties, and thereby complainant would be exposed to great loss and damages by reason of double recoveries in favor of different parties

on the same claim, or else put to great expense, trouble and hazard in order to prevent great and irreparable loss and injury by reason of actions based upon claims presented to the special master. That the expense incurred in defending such suits would be very great and would involve serious loss to complainant without regard to the result of such litigation; that the district court possessed jurisdiction to determine all questions relating to complainant's liability, and the extent thereof, and having by the order of reference elected to exercise its jurisdiction in that behalf, with the acquiescence and consent of the defendants in that proceeding, it would be unjust and inequitable to allow such a multiplicity of suits as would result from independent actions prosecuted against the complainant; and prayed that said defendants, and all other shippers and passengers using complainant's railroad during the time said injunctions were in force, be restrained and enjoined from instituting and prosecuting actions for the recovery of overcharges during the time said temporary and permanent injunctions were in force. (Rec. 50.)

The defendant, William J. Metcalf, filed a motion to dismiss the supplemental bill on the ground that it did not state a cause of action. (Rec. 56.)

Howard Gallup filed a separate motion to dismiss on the grounds that the court had no jurisdiction of the action and that the bill stated no course of

action. The motion was accompanied by an answer admitting all the allegations of the supplemental bill, alleging that the action brought by him in the State court was commenced before any action was brought against him, and denying the authority of the district court to enjoin prosecution of said action under the provisions of the act of Congress, or the usage of courts of chancery; further alleging that his suit was not brought to recover against complainant on the injunction bond, but was a proceeding for an accounting by complainant to him for overcharges collected in violation of the laws of the State during the time the temporary injunction was in force, and the greater part of the overcharges sued for by him was collected by complainant after the rendition of the final decree perpetuating the injunction. (Rec. 57.)

Said defendants joined in an assignment of errors on the following, among other grounds: That the court had no jurisdiction to entertain the supplemental bill; and that it had no ancillary jurisdiction over the defendants, or either of them. (Rec. 71.)

A final decree was rendered by the district court in accordance with the prayer of the bill, perpetually enjoining the defendants from instituting any action at law or in equity against the complainant, in any court, for the recovery of any charges collected of them for the transportation of persons or property within the State of Arkansas, in excess of the rates

inhibited by the order of injunction during the time the same was in force. (Rec. 60.)

From this decree an appeal was prayed by the defendants to the circuit court of appeals for the Eighth Circuit, and on May 8, 1915, an order was entered modifying the decree of the district court, "so as to restrain only such actions as are brought on one or both of the bonds, and as thus modified that the order and decree of the district court in this cause be, and the same is hereby affirmed." (Rec. 79.)

Complainant filed a petition for rehearing which was overruled, and thereupon prayed and was allowed an appeal to this court. The jurisdiction of the district court in the main case was based on a Federal question, and not on diversity of citizenship of any parties to the proceeding.

ASSIGNMENT OF ERRORS.

In holding that defendants could institute and maintain independent actions for alleged overcharges from the time the injunctions were in force, notwithstanding injunction bonds had been filed and the district court had retained jurisdiction, in the original proceeding for the purpose of ascertaining and enforcing the liability of complainant to parties of whom excessive rates had been exacted.

In holding that parties of whom excessive rates had been exacted during the time the injunctions

were in force were not confined to their remedy on the injunction bonds, but could bring independent actions to recover the alleged overcharges.

In holding that the ruling and decree of the district court could not be sustained on the ground of preventing a multiplicity of suits.

ARGUMENT AND BRIEF FOR APPELLANT.

JURISDICTION OF THE CIRCUIT COURT OF APPEALS:

The jurisdiction of the district court in the main case, as well as in this ancillary proceeding, was based on the ground that the cause of action arose under the Constitution and laws of the United States. Diversity of citizenship did not exist as a ground of jurisdiction, and the appeal from the decree of the district court lay direct to this court, and not to the circuit court of appeals, under sections 238 and 128 of the Judicial Code.

Union Planters Bank v. Memphis, 189 U. S. 71.

Carolina Glass Co. v. S. Carolina, 240 U. S. 305, 318.

THE DISTRICT COURT HAVING ASSUMED JURISDICTION TO ASSESS THE DAMAGES, ITS JURISDICTION WAS EXCLUSIVE.

The circuit court of appeals held that the district court had jurisdiction of all liabilities arising out of the injunction bonds and to restrain actions in other jurisdictions to collect such claims, but that its jurisdiction was limited to liability arising under the bonds. That the parties from whom excessive rates had been exacted were not confined to the bonds, but also had the right given them by law to recover the overcharge, which right was not de-

stroyed, but was simply suspended by the injunction, and as soon as the injunction was out of the way, the right and remedy for its enforcement stood the same as if it had never been issued. It also held that the action could not be suspended on the ground of multiplicity of suits. That the rights of each shipper or passenger, in case he relies, not on the bond, but on the statute, arose out of independent contract, and there is no community of right or interest such as is necessary to support jurisdiction in equity for the purpose of preventing a multiplicity of suits. (See opinion of the court of appeals, pp. 78-9 of the record.)

The reference to the master contained in the decree of the district court did not restrict his duties to claims arising under the bonds, but covered all damages sustained by any of the parties affected by the injunction. The order of reference was made under and in pursuance of Rule 15 of the district court which was intended to cover all the damages sustained by parties enjoined. (Rec. 48.)

The State Railroad Commissioners, as defendants in the main proceeding, represented all parties in interest, that is, all passengers and shippers. The appellees were therefore parties to the proceeding by representation. This is true for every purpose and as to every question that could arise in the exer-

cise of the jurisdiction of the district court in the progress of the case.

In re Englehard, 231 U. S. 646.

Reagan v. Farm Loan & Trust Co., 154 U. S. 362-390.

M., K. & T. R. R. Co. v. M., R. & W. Comnr., 183 U. S. 53-60.

The only damage that was or could have been sustained by the defendants under the case made by them was the difference between the inhibited rates and those put in force and collected of them by the appellants during the time the injunctions were in force, constituting overcharges, and it was for the recovery of such overcharges that suits were brought and threatened by them. The injunction bonds, and the orders under which they were made, in terms provided that appellant should keep a correct account showing the difference between the rates charged and the inhibited rates, with details necessary to identify each shipment, and the person by whom made, and the bonds were conditioned that if the injunctions were not eventually sustained, the complainant should, within a reasonable time to be fixed by the court, refund the excess charges collected while they were in force. (Rec. 40-3.)

The damage appellees seek to recover by outside proceedings in other courts is the same as that pro-

vided for by the injunction bonds, and the orders under which they were issued, as well as by the order of reference contained in the final decree. The ruling of the circuit court of appeals does not question the power of the district court to ascertain and enforce all claims based on the bonds, and restrain actions in other jurisdictions to collect the same, and concedes that the power would probably exist independent of the reservation contained in the court's orders, but attempts to distinguish between suits on the injunction bonds and the right of action conferred by law independent of the bonds, holding that in addition to the remedy on the bonds appellees had the right to proceed by independent actions at law in other jurisdictions, notwithstanding the district court had assumed jurisdiction for the purpose of adjusting the class of claims sought to be enforced by them in other jurisdictions.

It has come to be the established rule in Federal courts of equity, following the views stated in Russell v. Farley, 105 U. S. 433, that it is within the discretion of the court having possession of the case to have the damages assessed under its own direction as an incident of its jurisdiction, and for the purpose of doing complete justice and putting an end to further litigation.

Lea v. Deakin, 13 Fed. 514.

Leahman v. McQuown, 31 Fed. 138.

Coosa Mining Co. v. Farmers Mining Co., 51 Fed. 107.

Leslie v. Brown, 90 Fed. 174.

Tyler Mining Co. v. Lost Chance Mining Co., *Ib.* 22.

Cimiotti Unhairing Co. v. American Fur Refining Co., 158 Fed. 171.

Mississippi Valley Fuel Co. v. Watson Coal Co., 202 Fed. 124-5.

Ridlich Mfg. Co. v. Rice & Co., 203 Fed. 722.

Any damage caused to a party by the improper issuance of an injunction is based on the violation of a legal right which would give a right of action to the party injured upon the dissolution or suspension of the injunction, and the denial of the right of a party so situated to maintain independent actions in cases where the court that granted the injunction had assumed jurisdiction for the purpose of ascertaining and adjusting the damages is not based on the view that the legal right was destroyed, but rests solely upon the ground that the court that issued the injunction having taken jurisdiction to settle the damages should be allowed to continue in possession of and decide every question involved in the case, and the power to restrain parties from bringing independent suits is exercised to prevent a conflict of author-

ity between the courts, and for the protection and preservation of the jurisdiction of each tribunal free from encroachment by others.

In Lea v. Deakin, 13 Fed. 514, Circuit Judge Drummond said:

> "That court that orders the injunction prescribes the terms upon which it shall be issued, and may require a bond, stipulation, or undertaking as a condition upon which it shall be issued or not, according to its own view of the circumstances of the case. An assessment of damages thus becomes an incident of the principal case, and enables the court to do entire equity between the parties. If the party against whom the injunction has been issued can thus be idemnified, it would seem to be the duty of the court to proceed in the case, and not compel him to resort to an independent action at law to accomplish that result."

Mr. Justice Lurton, while on the circuit court of appeals, held:

> "It is a rule of almost universal application that, between courts of the same sovereignty and concurrent jurisdiction, the court which first acquires jurisdiction of the controversy, or of the res, should be suffered by every other court to decide every question within the sphere of the pending cause, and to continue in the possession of the subject-matter of the controversy until every question before it shall be decided and the res discharged from its control."

Phelps v. Mutual Reserve Fund Life Assn., 112 Fed. 464-5.

> "The rule is well settled that where a court rightfully takes jurisdiction over the parties and the subject-matter of a controversy, it has the right not only to render judgment in the first instance, but also to secure to the prevailing party the fruits of such judgment, and the original jurisdiction is a continuing one for that purpose; and as corollaries to the general rule, it is also equally well settled that where third parties have rights in or claims to property taken into the possession of the court under process issued against the original parties, such third parties may intervene in the proceedings for the protection of their rights; and, further, that where the process of the court is wrongfully and illegally used to the injury of a third party, the latter may appeal to the court for proper redress. Lamb v. Ewing, 54 Fed. 269."

In French v. Hay, the complainant in a suit that was removed from a State court to the circuit court of the United States got a decree in the State court, and sued on it in another State. The defendant in the proceeding filed a bill to enjoin the complainant from proceeding further in the State court, and the case coming to this court, it held that the circuit court having acquired jurisdiction in the original case, had the power to restrain the defendant, and it held that:

"The court on the original proceeding having jurisdiction in personam had power to require the defendant to do or to refrain from doing anything beyond the limits of its territorial jurisdiction which it might have required to be done or omitted within the limits of such territory. Having the possession and jurisdiction of the case, that jurisdiction embraced everything in the case, and every question arising which could be determined in it until it reached its termination and the jurisdiction is exhausted. While the jurisdiction lasted it was exclusive, and could not be trenched upon by any other tribunal."

French v. Hay, 22 Wallace 252.

In Taylor v. Taintor, 16 Wal. 370, it is said:

"Where a state court and a court of the United States may each take jurisdiction, the tribunal which first gets it holds it to the exclusion of the other until its duty is fully performed and the jurisdiction invoked is exhausted; and this rule applies alike in both civil and criminal cases. It is indeed a principal of universal jurisprudence that where jurisdiction has attached to person or thing, it is—unless there is some provision to the contrary—exclusive in effect until it has wrought its function."

See Prout v. Starr, 188 U. S., 537, 544.

In Harkrader v. Wadley, 172 U. S. 148-163, the court said:

"Two propositions have been so firmly established by frequent decisions of this court

> as to require only to be stated: * * * Second. When a state court and a court of the United States may each take jurisdiction of a matter, the tribunal where jurisdiction first attaches holds it to the exclusion of the other until its duty is fully performed and the jurisdiction involved is exhausted; and this rule applies alike to both civil and criminal cases. Freeman v. Howe, 24 HOW, 450; Buck v. Colbath, 3 Wall. 334; Taylor v. Taintor, 16 Wall. 366; Es Parte Crouch, 112 U. S. 178."

In the case at bar, the district court having, prior to the suits brought and threatened by appellees, taken jurisdiction for the purpose of assessing the damages arising out of the injunction, this case, we submit, falls within the principle of those cited, without regard to the source of appellant's liability, whether it grew out of the violation of a right conferred by the common law or statute, or rested on the injunction bond. We have been unable to find any case holding that the courts would look to the source of the liability, or claim, in question, in the application of the rule that the court first acquiring jurisdiction may exercise it for the purpose of completely disposing of all questions involved without interference from other courts, and to that end may restrain parties from proceeding in other tribunals by ancillary proceedings instituted for that purpose.

> "It would seem that the prevention of the conflict of authority between the State and Federal courts, and the protection and

> preservation of the jurisdiction of each, free from encroachments by the other, are considerations which lie at the very foundation of ancillary jurisdiction. A bill filed to continue a former litigation in the same court, or which relates to some matter already partly litigated in the same court, or which is an addition to a former litigation in the same court, by the same parties or their representatives standing in the same interest, or to obtain and secure the fruits, benefits and advantages of the proceedings and judgment in a former suit in the same court by the same or additional parties, standing in the same interest, is an ancillary suit. Bates on Federal Equity Procedure, p. 113, sec. 97, cited and approved in Julian v. Central Trust Company, 193 U. S. 93, 113.

R. R. Co. v. Bellamy, 211 Fed. 172.

THE DISTRICT COURT HAD JURISDICTION OF THIS PROCEEDING ON THE GROUND THAT IT INVOLVED A FEDERAL QUESTION.

Important questions involving the effect to be given the decree and orders in the main case are involved. The supplemental bill alleges:

> "That in the final decree entered in this cause on the 11th day of May, 1911, it was ordered that the bond for injunction filed by the complainant be released and the surety thereon discharged from further liability, and complainant is advised and avers that the effect of said order was to relieve it from all liability under said bond and preclude any recovery of damages on

said bond, or by reason of or growing out of the injunctions ordered in the aforesaid cause."

It further averred:

> "That upon the rendition of the final decree making the temporary injunction permanent, said bond ceased by operation by law to have any effect, and complainant is not liable for any damage that may have accrued to any passenger or shipper on its line of railroad after the rendition of the final decree perpetuating the injunctions." (Record, 55.)

The right to recover damages growing out of the action of the court in granting the preliminary injunction, and afterward the permanent injunction, will depend on the effect to be given the final decree in the main case discharging the bond, from which an appeal was taken to the Supreme Court of the United States; to the judgment reversing and remanding the case, and to the decree of the lower court entered pursuant to the mandate, all of which will necessarily have to be considered in determining the question of liability, and involve Federal questions. In Tullock v. Mulvane, 184 U. S. 504, it was held that a bond for injunction in an equity court of the United States is a bond executed by virtue of an authority exercised by the United States, and the defense that no liability on the bond could arise until the court of the United States, in which the controversy is pending, has finally deter-

mined that the injunction should not have been granted, was the assertion of immunity from liability dependent on the authority exercised under the United States, and necessarily involved a Federal question. The court said:

> "It is clear that if such a bond, given in a Federal court of equity, is not to be construed with reference to the rules of law applicable to such bonds in the Federal courts, then there can be no general rule by which to determine the liability of the obligors on the bond. Their responsibility would be one thing in a court of the United States and a different thing in the courts of the various States."

At page 505 the court said:

> "The test is not in the particular source or form by which the authority of the United States has been conferred or is exerted, but whether such authority existed and was exercised and an immunity is claimed under it."

A number of cases are cited by the court on pages 506, 507 and 508. Among them is the case of Avery v. Popper, 179 U. S. 305, in which the court said the rule was declared to be that where a controversy in the state court presented a contention as to the validity, or proper construction, of an order or decree rendered by a court of the United States, a Federal question was presented reviewable by this court. At page 505 the court, citing the case

of Russell v. Farley, 105 U. S. 433, said: "It is settled that such court (meaning the National court in which the injunction bond has been given) has the inherent right to set the bond aside and to determine in its discretion whether a recovery could be had upon it," and that identical question is raised by the supplemental bill, in the allegations that the district court by the final decree in the main case discharged the complainant from all liability under the bond, or for damages growing out of the injunction.

M. K. T. v. Elliot, 184 U. S. 530-4.

R. R. Co. v. Bellamy, 211 F. 172.

In the suits that were enjoined appellees were seeking to recover damages alleged to have been sustained by the action of the court in granting a preliminary and, afterwards, a permanent injunction. The determination of the questions presented involved the construction of the provision of the decree releasing the bonds, as affecting liability under the preliminary injunction, and the effect of the final decree. It is appellant's contention that the effect of the final decree perpetuating the injunction, from which an appeal was taken to this Court, would necessarily have to be determined in settling the question of liability growing out of the temporary injunction, and that there could be no liability after the final decree was ren-

dered and the issues disposed of by the court after full hearing; that the temporary order of injunction and the bond ceased to operate, and were all merged into the final decree and order made by the court, which operated in the same manner as a final decree in any other case would, and any injury arising from the perpetuating of the injunction would be treated as the result of the action of the court, and not of the parties.

The rule, as to the remedy where an injunction has been wrongfully issued and dissolved, is thus stated in 2 High on Injunctions, section 1648:

> "Some conflict of authority exists as to whether a defendant in an injunction suit may, by an action on the case, recover damages for having been enjoined without cause, and the rule has been broadly stated that no such right of action exists, and that his only remedy is by suit upon the injunction bond. The better doctrine, however, seems to be that defendant's right of action at common law is not merged in the remedy upon the bond, and that an action on the case will lie. But to support such action, the plaintiff's pleadings must clearly negative the existence of probable cause for the injunction; it will not suffice to allege that the writ was unjustly and wrongfully sued out, but there must be distinct allegations of malice or a want of probable cause."

This rule is almost universally followed by the courts. Harless v. Consumers Gas Trust Co., (Ind.)

43 N. E. 456; Asevado v. Orr, 100 (Cal.), 34 Pac. 778; Glen Jean, etc., v. Kanawha Ry. Co. (W. Va.), 35 S. E. 978, and cases cited; Mitchell v. R. R. Co., 75 Ga. 398; Hayden v. Keith (Minn.), 21 N. W. 195; Cayuga Bridge Co. v. Magee, 2 Page, Chancery, 116-122; Lawton v. Green, 64 N. Y. 325-330; Palmer v. Foley, 71 N. Y. 106-109; Cimiotti Unhairing Co. v. American Fur Refining Co., 168 F. 529-531; Meyers v. Block, 120 U. S. 206, 211; Iron Mountain Bank v. Mercantile Bank, 4 Mo. App. 505.

The foregoing cases cited many others in support of the rulings, which it is unnecessary to repeat here.

In Glen Jean, etc., v. Kanawha Ry. Co., the court said:

> "These cases all sustain the text found in High on Inj., section 1648, and 10 Enc. Pl. & Pr., 1119, and there are none to the contrary. The very purpose of the Legislature in requiring an injunction bond to cover actual damages sustained was to supply this defect in the common law, and was not declarative thereof. The defendant to a dissolved injunction has two remedies: 1 (statutory) on the injunction bond; the other (common law), for the malicious use of judicial process, without probable cause. Where no bond is given, the latter remedy alone exists. It becomes the defendant to an injunction suit to see that a good and sufficient bond is given, and, unless he does so, he can recover no damages in the pres-

ence of probable cause, and in the absence of malice."

In Asevado v. Orr, the court used the following language in discussing this question:

> "The law has provided that in certain classes of actions, a defendant may be restrained during the pendency of the action from enjoying property, or exercising dominion over the same, where his right to the property, or of dominion, is controverted by the plaintiff; and in such cases the plaintiff is required to indemnify the defendant against any injury that he may sustain from such restraint if it shall finally be determined that the plaintiff did not have a cause of action. The amount of this undertaking is fixed by the court as a measure of damage to be sustained, and is the limit of the defendant's right of recovery. It is to be assumed that the court has properly exercised its discretion in determining this amount; but if, at any time pending the litigation, it should be made to appear to the court that the undertaking is insufficient, it would have the power, and it would be its duty, to require an increase of the undertaking as the condition of allowing the plaintiff to continue the injunction. It is only when the process of the court is abused, or when the plaintiff seeks to avail himself of its power to harass or injure another by suing him upon a charge in which he is conscious of having no right of action, that he becomes amenable in damages for bringing such suit. Such an action is, however, in the nature of a malicious prosecution, and in any action to recover damages therefor

want of probable cause and malice are essential ingredients to the complaint, and must be clearly alleged and proved in order to sustain the action."

In Harless v. Consumers Gas Trust Company, the court, speaking of the early practice in such cases, said:

"In the early history of equity jurisprudence, temporary restraining orders were issued without requiring any bond or other security. If upon final hearing the injunction was dissolved, the party enjoined might recover his costs. But he had no other remedy except an action on the case when the suit was malicious and without probable cause. As the party enjoined frequently suffered great damages for which he had no adequate remedy, the custom grew up in the equity courts that the chancellor, in the exercise of his discretion, might require of the plaintiff a pledge or bond to indemnify the defendant against loss in the event the injunctive order should be wrongfully issued. Upon the dissolution of the injunction, the court might, in the same proceeding, determine whether or not the defendant was entitled to damages, and assess the same, or cause them to be assessed by reference to a master," and cited many authorities in support of its ruling.

In Meyers v. Block, the court said:

"Without a bond for the payment of damages, or other obligation of like effect, a party against whom an injunction wrongfully issues can recover nothing but costs,

> unless he can make out a case of malicious prosecution. It is only by reason of the bond, and upon the bond, that he can recover anything. When, therefore, the condition of the bond in these cases declares that the obligors will pay such damages as the obligee may recover against them, it must mean that they will pay such damages as he may recover by a suit on the bond itself."

It was held in Russell v. Farley, 105 U. S. 433, that:

> "Where an injunction is granted without requiring the party to give bond or other undertaking, the court has no power to award damages to the injured party except by making such a decree in the matter of costs as may be deemed equitable."

See also Houghton v. Meyers, 208 U. S. 149.

No case is cited by the court in support of the ruling that would make this case an exception to the general rule.

The injunction in this case did not have the effect to deprive the parties affected of any property right. It suspended the tariffs complained of by the complainant until the question of their reasonableness and validity could be investigated and determined by the court, and, for the purpose of protecting the legal rights of passengers and shippers, the court exacted the bonds that have been referred to. They afforded ample protection, and it was at all times

open for additional bond to be asked and required in case there should be doubt as to the sufficiency of the existing bond, and that, in fact, was done, and an additional bond in the sum of $800,000 was required in this case for the better protection of passengers and shippers on the railroad.

If a different rule obtained, and injunction bonds should be treated as merely cumulative of common law liability, very few cases would arise in which an independent common law action would not lie, as almost every case in which an interlocutory injunction is found to have been improperly issued would involve a denial or deprivation of some common law right of the defendant, resulting in damage to him, and the rule established by the courts would have been reversed.

In the case of Houghton v. Meyers, *supra*, a restraining order was issued on May 31, 1902, by the Supreme Court of the District of Columbia. The case was heard and a decree perpetuating the restraining order was entered on March 10, 1903, from which an appeal was taken to the Court of Appeals of the District, which resulted in the reversal of the decree. The case was returned to the district court and a decree entered dismissing the bill and dissolving the injunction, but refusing to assess damages. An appeal was taken from the latter decree to the District Court of Appeals and

a decree was there entered for the amount of the difference between postage due the Government at third-class rates and that paid at second-class rates, from the date of the filing of the injunction until the 16th of June, 1904, when the mailing at second-class rates was discontinued. The Supreme Court of the United States reversed so much of the decree as allowed damages after the date of the original decree in the District Supreme Court perpetuating the injunction, holding that the judgment giving damages after the date of the final decree was erroneous. The court's action was evidently based on the ground that the injunction bond ceased upon the entering of the final decree, but if there had been a liability on the part of the plaintiff in the proceeding, independent of the bond, it would have been competent, and better practice, for the court to have directed a judgment against the plaintiff in the proceeding for so much of the damage as accrued after the date of the decree, and if there had been any difficulty in apportioning the amount between the two periods it would have remanded the case with directions for proper steps to be taken for that purpose. That case is important, because the claim of the Government was for service in carrying publications through the mail at a rate less than it was entitled to charge. The facts were the converse of those existing in this case, but the principle applicable is the same in both cases.

MULTIPLICITY OF SUITS.

As during the six years the injunction was in force over one hundred thousand claims similar to appellant's arose, the injustice of permitting separate suits to be prosecuted in different courts is apparent. The appellees ask for a discovery requiring the Railroad Company to produce in the Chancery court of Baxter county all its books and waybills, in order that he may ascertain what is due him, although the court in its order of reference to the master required the railway company to furnish this information to the master. If this party has a right to do it, then every shipper has the same right, and how could the railway company comply with such an order made in thousands of such cases? The mere statement is sufficient to show the gross injustice and hardship that would result from permitting such a proceeding, while the action of the court in giving every one an opportunity to present his claim to the master in chancery, to have it adjudicated, can result in no injustice to any one, and is therefore equitable and just to all parties. That in such a case a court of equity, even in an original proceeding, will assume jurisdiction to avoid a multiplicity of suits has been determined by this court many times.

The court of appeals held that the order of the district court could not be sustained on the ground

of preventing multiplicity of suits, because there was no community of right or interest between the claimants for restitution such as is necessary to support jurisdiction in equity for the purpose of preventing a multiplicity of suits, citing the case of Hale v. Allison, 188 U. S. 56. There is no analogy between the facts of that and the present case. The court said at page 78 of the opinion:

> "We are not disposed to deny that jurisdiction on the ground of preventing a multiplicity of suits may be exercised in many cases in behalf of a single complainant against a number of defendants, although there is no common title nor community of right or interest in the subject matter among such defendants, but where there is a community of interest among them in the questions of law and fact involved in the general controversy."

Thus drawing a distinction which we think is controlling in this case.

In Wyman v. Bowman, 127 Fed. 257, 263, the case of Hale v. Allison is distinguished. The court say at page 263:

> "There was no community of interest among the defendants in the controversies presented for litigation, and the convenience of the complainant in pursuing the single suit was overcome by the inconvenience of such a course to the several defendants. In this case there is a community of interest among the defendants in every question

> of fact and of law presented by the controversies, and the convenience of all parties will be better served by the determination of them here in a single suit than by repeated decisions of them in nine separate actions at law."

There can be no question that in the case at bar there is a community of interest in the questions of law and fact incident to the claims of the different claimants and that great hardship to the one party will be obviated, without inconvenience to the other party, by disposing of them in a single suit.

The rule was recognized in Bitterman v. Louisville & Nashville Railroad, 207 U. S. 205, 226, and in Tift v. Southern Ry. Co., 123 Fed. 789, 795, affirmed in 148 Fed. 1021, 79 C. C. A. 526.

Respectfully submitted,

JOHN M. MOORE,
For Appellant.

EDW. J. WHITE,
Of Counsel.